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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-188917

DATE: October 18, 1977

MATTER OF: Chipman Van & Storage, Inc.

DIGEST:

1. Protest asserting low bidder lacks Interstate Commerce Commission operating authority to perform contract under IFB which is silent on required operating authority essentially questions agency's affirmative determination of bidder's responsibility and is not for consideration by GAO absent showing of fraud or misapplication of definitive responsibility criteria.
2. ICC operating authority is not definitive responsibility criterion where solicitation is silent as to licenses required for performance of contract.
3. Small Business Administration determination that bidder subcontracting 60 percent of contract work is small business for purpose of the procurement is, by law, conclusive decision not subject to review by GAO.

Chipman Mayflower, Chipman Van & Storage, Inc. (Chipman) has protested the award of contract No. N00228-77-D-4300 by the Department of the Navy (Navy), Naval Supply Center, Oakland, California, to Bay Area Cartage Company (BAC), for preparing and moving household goods of Department of Defense personnel located in Northern California during calendar year 1977, resulting from invitation for bids (IFB) No. N00228-77-B-4300.

The Navy issued the IFB, a total small business set-aside, on November 3, 1976. Ten bids were received at bid opening on December 13, 1976. Letters from BAC and U. C. Moving Services (UC), dated November 22, 1976, were submitted with BAC's bid and noted by the Navy at the time of the bid opening. BAC's letter stated, in pertinent part, as follows:

"In preparing the bid submitted on behalf of Bay Area Cartage Company, we determined that the services to be performed would, at least in part, be contracted to U.C. Moving Services...."

Similarly, UC's letter advised that the firm would not bid, but that UC had entered a subcontract with BAC. BAC was the apparent low bidder on a portion of the requirements.

On December 16, 1976, a preaward survey of BAC's facilities was requested, pursuant to Armed Services Procurement Regulation (ASPR) §§ 1-905.4(b) and 1-906 (1976 ed.), with particular emphasis on ascertaining the portion of work to be subcontracted and verifying BAC's Interstate Commerce Commission (ICC) and Public Utilities Commission (PUC) operating authority. The survey, conducted on December 29, 1976, determined that 60 percent of the contract work (i.e., the production effort) would be subcontracted to UC, and that valid operating permits existed. The survey concluded that BAC was capable and had the necessary personnel and equipment to satisfactorily perform the contract.

The Navy's contracting officer requested a size status determination regarding BAC from the Small Business Administration (SBA) by letter of December 22, 1976, in accordance with ASPR § 1-703 (b)(2) (1976 ed.). By letter dated January 14, 1977, SBA responded in pertinent part as follows:

"[I]t is our determination that Pay Area Cartage is a small business for the pending procurement, and is not affiliated with U. C. Moving Services or Global Van Lines, Inc. [UC's parent company]."

On the basis of the preaward survey and SBA's determination, the Navy determined that BAC was a responsible bidder, eligible as a small business, and awarded BAC a primary contract for area I of schedules I and II (out-bound and inbound services) and a secondary contract for area II of schedules II and III (intra- and inter-area services) on January 18, 1977.

Chipman filed its protest with our Office on April 22, 1977. The protester asserts that the award to BAC was made in violation of ICC rules and regulations, citing the Commission's recent decision in Bud's Moving & Storage, Inc., Petition for Declaratory Order, 126 M.C.C. 56 (1977), as requiring that BAC hold an ICC motor carrier certification in its own name. Although the Bud's case was decided on November 11, 1976, the decision was not served (i.e., released to the public) until January 14, 1977. Neither BAC nor the Navy was on notice of the decision until after the IFB was issued and the bids were opened. On February 9, 1977, Chipman was sent a letter from the ICC recommending that the contractor take the necessary steps to obtain its own requisite operating authority. We have ascertained informally that BAC applied for ICC operating authority on March 11, 1977, and was granted temporary authority for 180 days, beginning on June 26, 1977.

Chipman's protest essentially raises the issue of whether BAC should have been determined to be a responsible bidder. As mentioned above, a preaward survey was conducted and the Navy determined that BAC was a responsible bidder on the basis of the preaward survey. Our Office reviews affirmative determinations of responsibility only upon a showing of fraud or when the solicitation contains definitive responsibility criteria which allegedly have not been applied. Vi-Mil, Inc., B-188171, February 23,

B-188917

1977, 77-1 CPD 132; Randall Manufacturing Company, Inc., B-185363, January 26, 1976, 76-1 CPD 44; Central Metal Products, 54 Comp. Gen. 66, 67 (1974), 74-2 CPD 64. The solicitation contained no definitive responsibility criterion requiring ICC operating authority and is silent concerning operating certificates required for performance of the contract. We have held that even when a solicitation expressly indicates the need for operating licenses in general language, whether or not a license is obtained is a matter solely between the contractor and the licensing authority. Mid-America Movers, Inc., B-187612, February 4, 1977, 77-1 CPD 92; McNamara-Lux Vans & Warehouses, Inc., B-185803, July 8, 1976, 76-2 CPD 20, aff'd, B-185803, September 3, 1976, 76-2 CPD 217; accord, District Moving & Storage, Inc. - Reconsideration, B-188200, June 16, 1977, 77-1 CPD 435. Because Chipman's protest does not allege fraud and, therefore, does not involve either of the conditions requisite to our review of the Navy's affirmative determination of responsibility, we will not consider this ground of the protest on the merits.

Chipman also contends that award of a small business set-aside contract to BAC violates SBA and ASPR regulations because UC, BAC's subcontractor, is the agent of a large business concern, Global Van Lines, Inc. Paragraph F7 of Part II of the IFB provides for subcontracting as follows:

"The contractor shall not subcontract without prior written approval of the Contracting Officer. The facilities of any approved subcontractor shall meet the minimum standards required by this contract."

The Navy was advised of BAC's intention to subcontract to UC at the time of the bid opening. Because of this, before award the Navy filed a size status protest with SBA, which determined BAC to be a small business for this procurement. The Navy's contracting officer approved the subcontracting arrangement in writing by letter to BAC dated February 2, 1977. The SPA is empowered by 15 U.S.C. § 637 (b)(6) (1970) to conclusively determine questions of small business size status for Federal procurement purposes; such decisions by SBA are not, therefore, subject to review by this Office. See, e.g., Gibraltar Industries, Inc., B-187567, January 31, 1977, 77-1 CPD 78; Pacific American Airlines, B-187504, B-187505, October 13, 1976, 76-2 CPD 330; Limpio Industries, B-187255, September 30, 1976, 76-2 CPD 301.

In view of the fact that the bases for the protest concern matters which are not for consideration by our Office, the protest is dismissed.


Paul G. Dembling
General Counsel